RESPONDENT'S BRIEF AND ARGUMENT.

Points and Authorities.

I.

The District Court was acting within the authority expressly vested in it by the provisions of Section 75 (s), subsection 2, of the Bankruptcy Act and in accordance with the applicable decisions of this Court and the lower Federal Courts in finding and adjudging that the three-year stay period began on March 22, 1940.

Wright v. *Union Central Life Insurance Company,* 311 U. S. 273, 85 L. Ed. 184, 61 S. Ct. 196.
Section 75 (s) of the Bankruptcy Act, 11 U. S. C. A., Section 203 (s).
In re Gammill, 45 F. Supp. 238.

II.

The three-year stay period began with the making and filing of the first appraisal on March 22, 1940, and no further finding by the District Court as to the fulfillment of the conditions set forth in the Bankruptcy Act or further order by the District Court as to the stay period was necessary.

Section 75 (s) of the Bankruptcy Act, 11 U. S. C. A., Section 203 (s).
In re Whitwer, 44 F. Supp. 466.

III.

Petitioner cannot maintain an appeal to reverse or modify a portion of an order or judgment of the District Court which petitioner had, prior to the making of said order or judgment, urged that court to make and to which portion of said order or judgment petitioner had failed to take exception.

Electrical Fittings Corporation v. *Thomas and Betts Company,* 307 U. S. 241, 83 L. Ed. 1263, 59 S. Ct. 860.

Public Service Commission v. *Brashear Freight Lines, Inc.,* 306 U. S. 204, 83 L. Ed. 608, 59 S. Ct. 480.

Lindheimer v. *Illinois Bell Telephone Co.,* 292 U. S. 151, 78 L. Ed. 1182, 54 S. Ct. 658.

New York Telephone Co. v. *Maltbie,* 291 U. S. 645, 78 L. Ed. 1041, 54 S. Ct. 443.

Guarantee Co. of North America v. *Phenix Ins. Co.,* 124 F. 170, certiorari denied, 187 U. S. 640, 47 L. Ed. 345, 23 S. Ct. 841.

Cockhran v. *M. & M. Transport Co.,* 110 F. (2d) 519.

Law v. *United States,* 266 U. S. 494, 69 L. Ed. 401, 45 S. Ct. 175.

Wear v. *Imperial Glass Co.,* 224 F. 60.

Illinois Central R. R. Co. v. *Egan,* 203 F. 937.

National Waterworks Co. v. *Kansas City,* 62 F. 853.

2 Am. Jur. 945.

3 Am. Jur. 427.

IV.

The District Court had jurisdiction to make and enter the order from which petitioner attempted to appeal and, hence, the Circuit Court of Appeals was correct in holding that petitioner could not appeal to reverse or modify a portion of the order he had sought and obtained.

In re McGoldrick et al., 121 F. (2d) 746.
In re Ostlind Mfg. Co., 19 F. Supp. 836.

V.

Debtor petitioner has not, in fact, waived any of his rights under the Bankruptcy Act, and has not been deprived of an orderly and proper administration under the Bankruptcy Act, but, as a matter of law, debtor petitioner is free to accept any procedure other than that laid down in the Bankruptcy Act, and thus waive a course of procedure upon which he might otherwise insist.

In re Denney, 135 F. (2d) 184.

VI.

The Circuit Court of Appeals was acting in accordance with the provisions of Section 75 (s), subsection 2, of the Bankruptcy Act, and in accordance with the applicable decisions of this Court and the lower Federal Courts in finding and adjudging that the rentals should be computed on the basis of the three-year stay period commencing on March 22, 1940.

Section 75 (s) (2) of the Bankruptcy Act, 11 U. S. C. A., Section 203 (s) (2).
Hepker v. *Equitable Life Assur. Soc. of United States*, 131 F. (2d) 926.

ARGUMENT.

I.

The District Court was acting within the authority expressly vested in it by the provisions of Section 75 (s), subsection 2, of the Bankruptcy Act, and in accordance with the applicable decisions of this Court and lower Federal Courts in finding and adjudging that the three-year stay period began on March 22, 1940.

Petitioner's argument supporting the first point set out in his brief under "Points and Authorities," is based almost entirely upon the case of *Borchard* v. *California Bank,* 310 U. S. 311, 84 L. Ed. 1222, 60 S. Ct. 957. Petitioner contends that under the holding of this Court in that case, the District Court erred in not making an order starting the three-year stay period on May 29, 1942, and likewise that the Circuit Court of Appeals was in error in affirming the District Court on this point. Petitioner at page 14 of his argument without so stating actually quotes first a part of the opinion in *John Hancock Mutual Life Insurance Company* v. *Bartels,* 308 U. S. 180, 85 L. Ed. 184, 60 S. Ct. 221, as copied into the opinion in the later case and follows it with the quotation of a portion of Mr. Justice Roberts' opinion in *Borchard* v. *California Bank, supra.* While the impression created by the quotation, unexplained, is that it came only from the Borchard case, the fact is that this Court in the later case was in part quoting from the Bartels case. The two partial and disconnected quotations do not accurately represent the holdings of this Court in either of the cases referred to and only add confusion to the consideration of petitioner's first point.

In the Bartels case this Court held that the District Court had failed to have an appraisal made and reversed the District Court's order dismissing the debtor's petition, because an appraisal was required by the statute and had not been allowed. Respondent submits that the absence of an appraisal in the Bartels case is a distinguishing factor between such case and the case at bar. In the case at bar, as shown by the transcript of the record (R. 41, 42, 43, 114) an original appraisal was filed on March 22, 1940, and a re-appraisal, made at the petitioner's request, was filed on September 4, 1940. This Court, in the Bartels case, specifically states:

> "Bartels then asked, also as provided in subsection (s), that his property be appraised, that his exemption be set aside to him as provided by state law, and that he be allowed to retain possession of his property, under the supervision of the court, that is, subject to such orders as the court might make in accordance with the statute. The court failed to take that action. Instead of having the property appraised, the court received conflicting testimony as to value, discussed the chances of the debtor's rehabilitation, and dismissed the petition and all proceedings thereunder."

Respondent desires to make it clear at this point that it has never contended and does not now contend that the three-year stay period can begin to run in the absence of an appraisal, which was admittedly lacking in the Bartels case. The lack of an appraisal in the Bartels case entirely destroys the value of such case as an authority favoring the petitioner.

Turning to the Borchard case, respondent calls attention to an important fact which petitioner apparently overlooked in citing such case as authority supporting his

first point. As this Court is aware, the appraisal in the Borchard case was made while the debtor was in the stage of the conciliation proceedings covered by subsections (a) to (r) of Section 75 of the Bankruptcy Act and not after he was within the provisions of subsection (s) of that Act. Since there is no provision or authority for an appraisal prior to subsection (s), the legal situation was the same as though no appraisal had ever been made and filed at any stage of the proceedings. This is borne out by the following statement of this Court, at page 1223 of 84 L. Ed.:

> "March 25, 1935, the Conciliation Commissioner appointed appraisers, who filed an appraisement on May 1, valuing the debtor's real estate at $68,550. It is to be noted that § 75 contains no provisions for appraisal during the course of the Conciliation Proceedings covered by subsection (a) to (r); nor do we find any rule of the District Court providing for appraisal at this stage of the cause."

When this situation is understood, it will be immediately realized that as a matter of law no appraisal was ever made and filed as provided by the Bankruptcy Act at any stage of the proceeding, and no stay order was ever made and entered. It is therefore very easy to understand why the creditor was denied relief by this Court in the Borchard case. At the same time it becomes very apparent why the Borchard case and the case at bar are definitely distinguishable on the facts and why they are governed by different legal principles. In the Borchard case there was no appraisal, no stay order and no recognition of the jurisdiction of the Bankruptcy Court with the obvious result that the three-year stay period had never commenced and, as this Court correctly held, the debtor was entitled to have an appraisal made, his exemptions set off and a stay order entered. Contrasted with that situa-

tion, in the case at bar a valid appraisal has been made and filed, a valid reappraisal has been made and filed, and the absolute jurisdiction of the Bankruptcy Court has been recognized by the debtor and creditor alike at all times during the pendency of the entire proceeding. When it is realized that there was no appraisal of any kind in the Bartels case and that in the Borchard case this Court treated the situation as though no valid appraisal had been made and filed, and that in neither case had there been a stay order entered, it is apparent that the two fragmentary quotations made by petitioner at page 14 of his argument cannot and do not represent the holdings of this Court in the two cases referred to and, further, because of the different factual situation involved, petitioner's contention that the Borchard case is controlling in the case at bar is entirely unfounded.

Even if the holdings in the Borchard and Bartels cases were applicable to the facts involved in the instant case, respondent submits that the construction given these two cases by this Court in the later case of *Wright* v. *Union Central Life Insurance Company,* 311 U. S. 185, 85 L. Ed. 184, 61 S. Ct. 196, is correct and when applied to the present case leads necessarily to the conclusion that the District Court correctly held that the three-year stay period began to run on March 22, 1940. In the first paragraph of the opinion in the Wright case, the following language is found:

> "The present record does not disclose all that has transpired in this proceeding. For example, it does not appear whether the debtor asked for an appraisal under 75 (s), which it is the duty of the court to make on such request and in which event the three-year stay provided for in 75 (s) (2) may start to run only after such appraisal has been made. *John Hancock Mut. L. Ins. Co.* v. *Bartels,* 308 U. S. 180, 84 L.

> Ed. 176, 60 S. Ct. 221, 41 Am. Bankr. Rep. (N. S.) 296; *Borchard* v. *California Bank,* 310 U. S. 311, 84 L. Ed. 1222, 60 S. Ct. 957, 42 Am. Bankr. Rep. (N. S.) 596. But such problem is not sharply represented by the record before us. The narrow issue presented by this petition for certiorari and which moved us to grant it is whether under 75 (s) (3) the debtor must be accorded an opportunity, on his request, to redeem the property at the reappraised value or at a value fixed by the court before the court may order a public sale." (The underlining is ours.)

It will be noted that this Court in the Wright case specifically stated that the three-year stay period may start to run only after the appraisal has been made and filed. This was exactly the effect of the order of the District Court concerning which petitioner is complaining.

The remainder of the petitioner's argument, under his first point, is devoted to a discussion of the case of *Paradise Land & Livestock Co.* v. *Federal Land Bank of Berkeley,* 118 F. (2d) 215. Incidentally, petitioner also cites *Hardt* v. *Kirkpatrick,* 91 F. (2d) 875, and *Bernard* v. *Johnson,* 103 F. (2d) 567, affirmed 313 U. S. 537, 85 L. Ed. 1507. The two last named cases are cited by petitioner at subsequent points in his brief and inasmuch as they will be given detailed attention later, no effort will be made to analyze them in connection with this branch of the case. Petitioner cites the three cases just referred to as establishing that the three-year stay provided for in paragraph 2 of Section 75 (s) is not an automatic stay but a judicial one. Respondent takes no exception to the holding of these cases, but is unable to see how the principle announced has any application to the facts of the instant case, for in the instant case, whether or not it was necessary, we find an order specifically granting the three-year stay.

The record (R. 36) shows that Judge Munger entered a stay order on October 27, 1938. There is no dispute that this order was not appealed from and has long since become final. It it doubtful whether, under the holdings of this Court discussed above, such order could have force and effect until the subsequent making and filing of the appraisal on March 22, 1940. Certainly, it cannot be contended by petitioner that from and after March 22, 1940, a stay was not in effect, and neither can he contend that the original stay order and the subsequent appraisal constituted action other than judicial in character.

Turning to the case of *Paradise Land & Livestock Co.* v. *Federal Land Bank of Berkeley, supra,* respondent believes that this Court will recognize, first, that such case on its facts is entirely different from the case at bar, and second, that even if it were conceded for the purpose of argument that such case is similar on its facts to the instant case the holding of the Tenth Circuit Court of Appeals in the Paradise case is contrary to the holding of this Court in *Wright* v. *Union Central Life Insurance Company, Borchard* v. *California Bank,* and *John Hancock Mutual Life Insurance Company* v. *Bartels, supra.* With respect to the facts involved in the Paradise case, a careful reading of the opinion reveals that the appraisal in such case preceded, by over two years, the entry of a stay order of any kind, and that the order appealed from (the stay order) was in fact a *nunc pro tunc* order. As previously noted, in the present case the stay order preceded the appraisal and the order of the District Court which was appealed from and that the order appealed from was not a stay order nor *nunc pro tunc* in its operation.

Further, in the Paradise case the debtor had in no way recognized the jurisdiction of the Bankruptcy Court. While an appraisal had been filed, the debtor's exemptions had never been set off to him, he had paid no rent, and no

stay order had been entered giving him the protection of the Bankruptcy Court. In the instant case, on the other hand, a valid appraisal, stay order and a valid reappraisal had been made and filed, the debtor had paid rent under the original rental order of the court, and at all times the complete jurisdiction of the Bankruptcy Court had been recognized both by the debtor and his creditors. Petitioner submits, therefore, that in view of the different factual situations involved the holding in the Paradise case could have no application to the present case.

As has heretofore been stated, if it were conceded for the purpose of argument that the facts of the Paradise case and the present case are similar, the holding of the Tenth Circuit Court of Appeals in the Paradise case is contrary to the principles announced by this Court in *Wright* v. *Union Central Life Insurance Company, Borchard* v. *California Bank,* and *John Hancock Mutual Life Insurance Company* v. *Bartels, supra.* In all three of these cases, as this Court will recall, it was only held that in any event the three-year stay period could not begin to run until after an appraisal had been made and filed, and in none of these cases did this Court hold that a prior stay order was necessary to the beginning of such three-year period.

Respondent directs the Court's attention to the case of *In Re Gammill,* 45 F. Supp. 238, a District Court case in which the facts involved are practically identical with those in the case at bar and the opinion especially well reasoned. There the debtor was adjudicated a bankrupt under the provisions of subsection (s), Section 75, and on August 10, 1936, appraisal was made which was filed on August 18, 1936, and the exemptions of the bankrupt set aside to him two days later without any request being made by the bankrupt to have the appraisal made and the exemptions set aside to him. *No stay order was ever en-*

tered in the case. The opinion states, at page 239, that the appraiser filed their report and there is no reference in the opinion to any approval by the Conciliation Commissioner or the District Judge. On November 17, 1939, over three years after the filing of the appraisal, a secured creditor filed a petition suggesting the expiration of the three-year moratorium period and praying for the appointment of a trustee and the sale of the property as provided for under the statute, and also for the discharge of the debtor and the closing of the estate. A hearing was held before the Conciliation Commissioner. Among other things, he found that "more than three years had elapsed since the debtor was adjudged a bankrupt." Notice was given to all persons interested and, no exceptions or objections having been filed within the time provided, the District Court entered an order which, among other things, discharged the debtor from bankruptcy and authorized the secured creditors to pursue any remedies they might have under the laws of the state of Illinois. Over a year later the debtor filed a petition asking that the court restrain the secured creditors from prosecuting any proceedings against him in the state courts of Illinois. The debtor's contention was that since no stay order had actually been entered either before or following the appraisal of the bankrupt's property and the setting aside to him of his exemptions, the moratorium period had never started to run and that he was entitled to be restored to the possession of his property and to have a stay order entered declaring another three-year moratorium period, after which he should have an opportunity to redeem the land at its appraised or reappraised value. It should be noted that this is virtually the exact contention made by the petitioner in the Mach case. The court held that the three-year stay period had started to run from the filing of the appraisal and the setting aside

to the bankrupt of his exemptions, even though (as in the case at bar) no stay order had ever been entered prior or subsequent to the filing of the appraisal. It should be here noted that in the Mach case such an order was entered before the filing of the appraisal. At page 241 the court makes the following statement:

> "It seems to me that the appraisal of the defendant's property, the setting aside to him of his exemptions, and the arrangement whereby bankrupt was left in possession of and given the actual use of all of the property he was himself farming and using prior to bankruptcy, started the three-year moratorium period not later than August 20, 1936, the date of his exemptions were set off to him after the report of appraisers filed on August 18, 1936. This result is not affected by the failure to enter a stay order for the reason that the absolute jurisdiction of this court was recognized by bankrupt and creditors alike at all times during the pendency of the entire proceeding as if stay order had been entered."

Respondent submits that the language used by the court in such case would and should have equal or greater force and application to the facts involved in the instant case. It should be noted that in the Illinois case as in the case at bar the debtor assumed that the three-year stay was running and that he was entitled to the protection of the bankruptcy court to the same extent as though a stay order had in fact been entered pursuant to the appraisal and took full advantage of the protection so afforded, even as did Charles J. Mach in the case at bar.

Petitioner respectfully submits that in view of the foregoing authorities and what has been said herein, this Court cannot but sustain the order and decree as made by the District Court and as affirmed on appeal by the

Circuit Court of Appeals, to the effect that March 22, 1940, was the beginning of the three-year stay period.

2.

The three-year stay period began with the making and filing of the first appraisal on March 22, 1940, and no further finding as to the fulfillment of the conditions set forth in the Bankruptcy Act or further order by the District Court as to the stay period was necessary.

At the outset it should be noted that petitioner in the second part of his argument is assuming that the District Court in its order or decree made and entered on March 13, 1942, *began* the three-year stay period as of March 22, 1940. The authorities heretofore cited make it clear that the three-year stay period commences with the making and filing of the appraisal where there has been a prior stay order, as was true in the present case. Consequently, the District Court's order of May 29, 1942, was unnecessarily to start the running of the stay period. The order made could have no effect upon the running of three-year stay period and was merely declaratory of the legal situation which already existed. Such order, however, does serve the useful purpose of definitely fixing the terminal date of the three-year stay period as March 22, 1943.

Petitioner further contends that the three-year stay period could not begin to run on March 22, 1940, because the appraisal was never approved by the referee or judge, which action he contends is required by the Bankrupt Act. Three cases are cited by petitioner, at the top of page 16 of his brief, in support of this contention. Frankly, respondent is unable to find any language in these cases even tending to support the position that there must be an approval of the appraisal by the referee or judge. In

none of these was any question raised as to the presence or absence of approval of the appraisal. After a thorough search respondent has been able to find only one case on this specific point. In *In Re Whitwer,* 44 F. Supp. 466, a case originating in the Nebraska District, this exact question was raised. The debtor filed his amended petition under Section 75, subsection (s), on July 18, 1939, and was adjudicated a bankrupt under date of August 15, 1939. On September 22, 1939, the designated appraisers filed their appraisal. On October 13, 1939, debtor filed an application for exemptions.

No objections to the appraisal were ever filed and no formal order was ever made either by the Judge or by the Conciliation Commissioner, either approving and confirming it or setting it aside. Nor was any order made setting aside exemptions or allowing, in one single order, a stay of three years in accordance with the provisions of Section 75, subsection (s). On October 30, 1939, an order was made granting a stay of all proceedings until October 30, 1940, and prescribing certain rentals for the land. On May 9, 1941, a further order was made staying all judicial proceedings "for such additional period of one year from March 1, 1941, to February 28, 1942." On November 4, 1941, the debtor filed a petition asking for a further extension of the stay. A secured creditor subsequently filed objections to a further stay and requested a reappraisal.

The creditor contended that no further stay should be given the debtor because the three-year stay period had expired. The debtor contended that the three-year stay period had never started to run because the original appraisal had never been approved by the Conciliation Commissioner or Judge, and that therefore he was then entitled to a stay of three years. This, the Court will note, is the same contention as is being made in the case at bar.

The court there held that the appraisal was valid even though no order approving the appraisal had ever been made either by the Judge or Conciliation Commissioner, and specifically stated in the course of its opinion, at page 469, that such approval was not a jurisdictional prerequisite to the validity or finality of the appraisal. The court there lays down the following rule:

> "Section 75, sub. s, with due allowance for its palpable incoherence, does not seem necessarily to contemplate the approval by the referee (conciliation commissioner) of the appraisal in every case. The court is unable to say that such approval is a jurisdictional prerequisite to the validity or finality of the appraisal. There is no express mandate for approval in the amendatory 'section.' Nor is such a mandate to be found in 'the act' (meaning the Bankruptcy Act.) *In Re Bumpass,* D. C., 23 F. Supp. 876; *Federal Land Bank of Berkeley* v. *Nalder,* 10 Cir., 116 F. (2d) 1004. • • •
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> To this court it seems probable that the language of Sec. 75, sub. s, with reference to approval of the appraisal by the referee, is merely a recognition of the fact that in an instance where an appraisal is made the object of attack there will actually be an order upon it by the referee, and a prescription of a period thereafter in which his action may be reviewed. Whatever may be its construction, it is patently confusing and incomplete. But it is hardly the mission of the court either to clarify its hopeless confusion or to supply its palpable omissions. The court holds only that the language in question is not sufficient to constitute a mandate for a referees' approval of every appraisal; and that the appraisal made in this case of September 22, 1939, is a valid and complete appraisal."

In the light of the facts involved in the case at bar and the state of the law on the point, it follows, respond-

ent contends, that the appraisal filed March 22, 1940, was valid and effective to begin the three-year stay period.

3.

Petitioner cannot maintain an appeal to reverse or modify a portion of an order or judgment of the District Court which petitioner had, prior to the making of said order or judgment, urged that Court to make and to which portion of said order or judgment petitioner had failed to take exception.

Petitioner does not deny the correctness of the ruling of the Circuit Court of Appeals to the effect that one who secures, by a judgment, order or decree, all the relief he seeks cannot maintain an appeal to reverse or modify such judgment, order or decree. He now claims, however, that in fact he had contended before the District Court that the stay period would not begin until the date of the District Court's order, and that, therefore, the rule just stated has no application. An examination of the record will clearly reveal that petitioner at all times before the District Court claimed that the three-year stay period should be deemed to have commenced on March 22, 1940, the date of the filing of the first appraisal. Respondent filed an application under date of September 16, 1941, asking, among other things, that the proceeding be terminated because of the termination of the three-year stay period on October 27, 1941 (R. 104-109). In opposition to this application, petitioner, under date of February 17, 1942 (R. 114), filed a motion which reads in part as follows:

> "that an appraisal was made and filed in this court on March 22, 1940, and a reappraisal of the debtor's property was later made and filed September 4, 1940, and that under subsection (s), Section 75, of the Act,

a stay of all proceedings against the debtor or his property must be granted for a period of three years from the filing of the appraisal of the property, for said time has not fully elapsed and determined.

Charles J. Mach,
(The underlining is ours.) Debtor."

At the hearing held at Grand Island, Nebraska, on May 13, 1942, the District Court, among other things, found and held that the three-year stay period began on March 22, 1940 (R. 118-122). The District Court verbally announced its decision at the conclusion of the hearing and afforded both parties an opportunity to take exceptions. *No exception was taken to this part of the order by the petitioner.* It was respondent who took exceptions to this part of the order. At the same time, petitioner took exceptions to other parts of the order which were adverse to his contentions. Is it believable that if in fact petitioner had then been making the contention which he made befor the Circuit Court of Appeals and makes before this Court he would have failed to take exception to that part of the order which he now claims was improper and erroneous?

Petitioner, at page 17 of his brief, places great importance on his notice of appeal filed May 21, 1942, eight days after the hearing and the oral decision of the District Court, and eight days before the District Court's written order was filed, as sustaining his present contention. When it is realized, however, that the notice of appeal was not in any way directed to the District Court and did not have and could not have had as its purpose the influencing of the District Court's decision, for that decision had already been made, but rather was given as a necessary step in appealing to the Circuit Court of Appeals, it becomes apparent that petitioner was attempting

a change to what he then considered a more favorable ground for the purpose of his proposed appeal. Likewise, it is clear that the facts of the instant case in this connection do not bring it within the rule of *Wear* v. *Imperial Window Glass Co.*, 224 F. 60, cited at the bottom of page 17 of petitioner's brief, for such case holds the calling of the alleged error to the attention of the trial court prior to the institution of steps leading to an appeal to be an indispensable preliminary thereto. As previously noted, the District Court in the Mach case had already advised the parties of his decision and it was in giving notice of his appeal that petitioner first made the contention which he makes in this portion of his brief. His claim that such action called the alleged error to the attention of the Trial Court is obviously fallacious. Clearly, the Circuit Court of Appeals was amply justified in light of the state of the record and the authorities cited in its opinion and set out immediately below herein in holding that petitioner could not appeal from a portion of an order he had sought to have made and entered and to which he had subsequently failed to take exception. *Electrical Fittings Corp.* v. *Thomas and Betts Co.*, 307 U. S. 241, 59 S. Ct. 860, 83 L. Ed. 1263; *Public Service Commission* v. *Brashear Freight Lines, Inc.*, 306 U. S. 204, 59 S. Ct. 480, 83 L. Ed. 608; *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 54 S. Ct. 658, 78 L. Ed. 1182; *New York Telephone Co.* v. *Maltbie*, 291 U. S. 645, 54 S. Ct. 443, 78 L. Ed. 1041; *Guarantee Co. of North America* v. *Phenix Ins. Co.*, 124 F. 170, certiorari denied 187 U. S. 640, 23 S. Ct. 841, 47 L. Ed. 345; *Cockhran* v. *M. & M. Transp. Co.*, 110 F. (2d) 519, 2 Am. Jur. 945; *Law* v. *United States*, 266 U. S. 494, 45 S. Ct. 175, 69 L. Ed. 401; *Wear* v. *Imperial Window Glass Co.*, 224 F. 60; *Illinois Cent. R. R. Co.* v. *Egan*, 203 F. 937; *National Waterworks Co.* v. *Kansas City*, 62 F. 853, 3 Am. Jur. 427.

4.

The District Court had jurisdiction to make and enter the order from which petitioner attempted to appeal and, hence, the Circuit Court of Appeals was correct in holding that petitioner could not appeal to reverse or modify a portion of the order he had sought and obtained.

In the fourth part of petitioner's argument, the proposition is advanced that, even if it be conceded that the petitioner appealed from the judgment or order in his own favor, petitioner, nevertheless, had the right to attack collaterally this judgment or order, because it was void. Petitioner states that the case of *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241, 83 L. Ed. 1263, 59 S. Ct. 860, cited by the Circuit Court of Appeals, in connection with this point, actually does not support the rule announced by the Circuit Court of Appeals, and, in fact, supports the proposition advanced by petitioner in part four of his argument. However, a careful reading of this case will reveal that petitioner's statement is not warranted. The case actually held that the defendant in a patent infringement suit wherein plaintiff failed to prove infringement, but in which the court unnecessarily held the patent valid in part, may, though he is the successful party, appeal from so much of the decree as adjudged the validity of the patent, not for the purpose of obtaining a review of the merits, but to obtain the reformation of the decree. It is apparent, therefore, that this case is not authority for petitioner's proposition, and, in fact, supports the general rule followed by the Circuit Court of Appeals in the case at bar. Petitioner next cites a number of cases on page 19 of his brief and concludes his argument on this point by stating that such cases are in direct conflict with the Circuit Court of Appeals' decision, and at the same time support the proposition maintained by petitioner. We feel confident that this Court,

after a review of these cases, will agree with respondent that in each and every one of these cases the proceedings were void from the very start and the court at no time had jurisdiction to make the order in question. It will also appear that none of these cases involve proceedings under Section 75 (s) of the Bankruptcy Act. Respondent cannot conceive that petitioner seriously urges that the District Court, in the case at bar, would not have jurisdiction to enter the order and judgment complained of herein. The record shows that on January 10, 1938, the District Court had entered an order adjudging the debtor a bankrupt under Section 75 (s) of the Bankruptcy Act (R. 2, 3). From this point on until the making of the order appealed from, on May 13, 1942, the record reveals countless other instances demonstrating that not only was the petitioner within the jurisdiction of the District Court as a matter of law, but, in addition, both petitioner and his creditors had recognized the absolute jurisdiction of the District Court at all times. In the case of *In Re McGoldrick,* 121 F. (2d) 746, a similar question was raised, by the contention of debtor that the District Court had no jurisdiction to make and enter an order of sale, because of an alleged failure to comply with the conditions required under the Bankruptcy Act, precedent to the issuance of such an order. The Ninth Circuit Court of Appeals met this contention by referring to the case of *In Re Ostlind Mfg. Co.,* 19 F. Supp. 836, and quoting, approvingly, from such case in part as follows:

> "The fundamental purpose of the Act relating to bankruptcies is to conserve the properties for the benefit of debtor and creditors alike, or to reduce the assets to cash for distribution among the creditors. All the specific directions of these laws, although mandatory in form and subservient to these major purposes * * *.

"But it may be objected to that since the provision of statute and mandatory violation thereof removes the foundation for the orders. But jurisdiction, once established, is not so avoided * * *.

"Where a court has jurisdiction, it is not obliged to render correct decisions. It has authority to hear and determine. If within the scope of power and founded in jurisdiction, the decision, whether right or wrong, is a judicial act and a finality."

On the basis of the holding in the McGoldrick case, petitioner's position in the fourth point of his argument is entirely untenable and it necessarily follows that the Circuit Court of Appeals was correct in denying petitioner's attempted attack on the portion of the order or judgment of the District Court holding that the three-year stay period began to run on March 22, 1940.

5.

Debtor petitioner has not, in fact, waived any of his rights under the Bankruptcy Act, and has not been deprived of an orderly and proper administration under the Bankruptcy Act; but, as a matter of law, debtor petitioner is free to accept any procedure other than that laid down in the Bankruptcy Act, and thus waive a course of procedure upon which he might otherwise insist.

Part five of petitioner's brief appears at pages 5 and 6 thereof and has to do with his contention that the Circuit Court of Appeals has, in effect, held that by filing the motion dated February 17, 1940 (R. 114), petitioner waived his rights under Section 75 (s) of the Bankruptcy Act; that there is no provision in the Bankruptcy Act providing for such waiver, and that such waiver is clearly against public policy. Petitioner cites no case in support of his contention that it is against public policy for the

debtor petitioner to waive any right which he might have under the Bankruptcy Act, and contents himself with that naked, unsupported statement. In view of the obvious weakness of the petitioner's contention with respect to public policy, respondent will do no more than to observe that there is no more reason for public policy to oppose the debtor waiving his rights under the Bankruptcy Act than there is reason for public policy to oppose to the creditor waiving his rights under such Act.

While petitioner endeavors in this branch of the argument to create the impression that he was wrongfully held by the Circuit Court of Appeals to have waived his rights under the Bankruptcy Act and has been deprived of the benefits of an orderly and proper administration under the Bankruptcy Act, he does not, at any place, call attention to the instances where said alleged deprivations have taken place, or to those acts on his part which he claims were wrongfully construed as waivers. As a matter of fact, debtor petitioner has, by a combination of circumstances, actually obtained much more than his full share of the protection contemplated by the Bankruptcy Act. Since January 10, 1938, petitioner has been within the protection of the Bankruptcy Court. As appears from the transcript of the record, petitioner has many times failed and refused to obey the orders of the Conciliation Commissioner and the District Court, relative to the payment of rentals. While petitioner requested an appraisal on December 20, 1937, he waited over two years before he called the attention of the District Court to the fact that no appraisal had been made, and then obtained the appraisal which he should have obtained over two years previously. In February of 1942, petitioner was before the District Court claiming that the three-year stay period began to run on March 22, 1940, the date of the filing of the first appraisal. In the Circuit Court of Appeals he

claimed that the stay period *did not* begin to run at such time and never had started to run, and now he is before this Court making a similar contention. Surely, this Court cannot but conclude, as the District Court and the Circuit Court of Appeals did, that the debtor petitioner, Charles J. Mach, is attempting to make a mockery of the courts and defeat the ends of justice. Certainly, it must be concluded that it ill becomes the debtor, after having received the protection of the court for a period of over five years, now to repudiate the status he has occupied and flaunt the authority of the court in contending that no valid stay has ever been in effect.

The petitioner next contends that the Circuit Court of Appeals, in effect, held that the petitioner, by filing the motion of February 14, 1940, waived his rights under the Bankruptcy Act and there resulted therefrom a sanctioning of improper procedure under the Bankruptcy Act. Petitioner further contends that such holding is contrary to the doctrine of this Court, announced in the cases of *John Hancock Mutual Life Insurance Company* v. *Bartels*, *Wright* v. *Union Central Life Insurance Company*, and *Borchard* v. *California Bank*, *supra*. Respondent submits that the three cases relied upon by petitioner have no application to the facts of the case at bar, in so far as petitioner's contention in this portion of his argument is concerned. In all three of the cases cited by petitioner, there was an effort to compel the debtor to accept a course of procedure other than that provided by the Bankruptcy Act. In none of these cases did the debtors, in pleadings filed under the advice of counsel, request the court to take the action of which they later complained. It will be recalled that the petitioner did in the instant case on February 17, 1940, specifically request the action of which he now complains.

Unlike the conduct of the debtors in the three cases cited by petitioner, it is clear from the record in the case at bar that the petitioner voluntarily and knowingly requested the court to follow the procedure concerning which he now is complaining, and to that extent his conduct necessarily amounted to a waiver of his right now to insist upon the letter of the Bankruptcy Act. In *In Re Denney,* 135 F. (2d) 184, the farmer-debtor, in open court, personally and by counsel agreed to an order providing that he should have the right to redeem the land, at its agreed value, on or before a certain date, in default of which the land was to be sold. Subsequently, the debtor failed to redeem the property, in accordance with the agreement, and the District Court ordered a trustee appointed and the property sold. The debtor then contended, as petitioner does in this case, that the agreement should not be given force and effect because it was contrary to the procedure laid down by the Bankruptcy Act. He also contended that under a proper construction of the Bankruptcy Act such a waiver was not permitted. The debtor in the Denney case cited the Bartels case and the Borchard case. The Circuit Court of Appeals held that the farmer-debtor was free to accept any procedure other than that laid down in the Bankruptcy Act and thus waive a course of procedure which he might otherwise insist upon. In dealing with the contention of the farmer-debtor, which was virtually identical with that made by the petitioner in his case, the court said:

> "With this contention we are unable to agree. The statute has prescribed a certain procedure that must be followed if the farmer-debtor insists upon it. It is not for the courts to point out or explore any short cuts. The court cannot force the farmer-debtor to accept any procedure except that laid down in the statute. That is not to say that the farmer-debtor may

not come into open court with his attorney and understandingly and voluntarily agree to another procedure. He may deem it to his advantage to accept another procedure. This he is free to do, unless the farmer-debtor is to be considered a ward of the court, which view we do not accept. This being so, the appellant may waive a procedure which he may otherwise insist upon."

On the facts and in view of the decision in the Denney case, where the facts and the contentions of the various parties were all but identical with those in the case at bar, it is submitted that petitioner's conention in the fifth division of his argument is entirely without merit.

6.

The Circuit Court of Appeals was acting in accordance with the provisions of Section 75 (s), subsection 2, of the Bankruptcy Act, and in accordance with the applicable decisions of this Court and the lower Federal Courts in finding and adjudging that the rentals should be computed on the basis of the three-year stay period commencing on March 22, 1940.

Petitioner's position in the sixth division of his argument is that the Circuit Court of Appeals erred in holding that the obligation to pay rent began on March 22, 1940, and that, under a proper construction of the Bankruptcy Act, rentals would not become due and payable until May 29, 1942, the date of the filing of the District Court's order. In support of such contention, petitioner cites no cases and is satisfied to quote from the Bankruptcy Act at the point in Section 75 (s) (2), where provision is made as to the payment of rentals. He makes particular reference to the part of said section which reads:

> "The first payment of such rental shall be made within one year of the date of the order staying proceedings. * * *"

Petitioner then proceeds to reason that since there was no stay order made and entered by the District Court on March 22, 1940, the Circuit Court of Appeals was in error in holding that the obligation to pay rent began at such date. In relying on such an argument, petitioner obviously is assuming that the three-year stay period did not, as a matter of law, begin on March 22, 1940. As previously noted herein, under the decisions of this Court and the lower Federal Courts as applied to the facts in the case at bar, the stay began on March 22, 1940, and expired March 22, 1943. In the face of such legal situation, petitioner is, in effect, contending that in spite of the existence of the three-year stay period, there is no obligation on his part to pay rentals for such period simply because a second stay order was not made and entered on March 22, 1940. In making this contention, he completely overlooks the following provision of Section 75 (s) (2):

> "During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semi-annually for that part of the property of which he retains possession." (The underlining is ours.)

The sustaining of petitioner's contention on this point would mean that while on the one hand he was entitled to all the benefits of a three-year stay from and after March 22, 1940, on the other hand he was under no obligation to comply with the express mandate of the Bankruptcy Act requiring the payment of rentals during the stay period.

In view of the obvious inconsistency of such position and its direct conflict with the provisions and spirit of the Bankruptcy Act, respondent submits that the Circuit Court of Appeals was clearly correct in its holding on this point.

In *Hepker* v. *Equitable Life Assur. Soc. of United States,* 131 F. (2d) 926, the District Court in entering its stay order also provided that rental should be paid from the date of adjudication in bankruptcy, which was some months previous. On appeal, the Eighth Circuit Court of Appeals held that the District Court erroneously required the debtor to pay rents prior to the beginning of the three-year stay period, but specifically held that the obligation to pay rents arose with the commencement of the three-year stay period. In the Circuit Court of Appeals, petitioner cited the Hepker case as sustaining his position on this point. The Circuit Court of Appeals made it clear in its opinion that while its holding in the Hepker case condemned the collection of rentals prior to the effective date of the stay, the responsibility to pay rent under the holding in such case began with the commencement of the stay period and, hence, in the case at bar, rentals were properly chargeable from and after March 22, 1940. In view of this application by the Circuit Court of Appeals of the rule announced in the Hepker case to the facts involved in the instant case, it becomes apparent why petitioner did not cite the Hepker case in its brief filed in this Court, after having done so before the court below. Respondent respectfully submits that in view of the preceding authorities and what has been said herein, the Circuit Court of Appeals was clearly correct in holding that the rentals should be computed on the basis of the three-year stay period, commencing March 22, 1940.

A review by this Court of the record will bring it vividly to the Court's attention that this debtor, Charles J. Mach, at all times treated the situation as though a stay was in effect. He was eager to seize, and did seize, any and all advantages that accrued to him by reason of proceedings being stayed, and thereby delayed and defeated all attempts on the part of the creditors to pursue their normal remedies. Seeing a possible advantage to him, he now takes exactly the opposite position. It would be most inequitable and shocking to the conscience were he now permitted to repudiate his previous conduct and receive advantages based on his claim that no stay was in effect. We cannot feel that this Honorable Court will lend the debtor its aid.

Conclusion.

The respondent, in view of what has been said herein, submits that the Circuit Court of Appeals in disposing of the issues before it could not rightfully have made different rulings than those in fact it did make, and that any different rulings on the part of the Circuit Court of Appeals would have constituted error requiring correction by this Court. Respondent, therefore, asks at the hands of this Honorable Court that the petition for writ of certiorari be denied.

Respectfully submitted.

THE ABBOTT COMPANY, a Corporation,
By E. H. BOYD,
W. R. METZ,
L. H. HENDERSON,
of Alliance, Nebraska,
and FRED A. WRIGHT,
of Scottsbluff, Nebraska,
Attorneys for Respondent.